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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1947

No. 551 79

THE E. C. SCHROEDER COMPANY, INCORPORATED, a Corporation,

Petitioner,

VERSUS

VIRGIL CLARK, for himself; and as agent for Jack F. Richardson, John H. Caraway, Floyd L. Jones, L. B. Price, John Doe, Richard Roe and all others similarly situated, employees of the defendant, The E. C. Schroeder Company, Incorporated, a Corporation,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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JUNE, 1948.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1947

No. 851

THE E. C. SCHROEDER COMPANY, INCORPORATED, a Corporation,

Petitioner,

VERSUS

VIRGIL CLARK, for himself; and as agent for Jack F. Richardson, John H. Caraway, Floyd L. Jones, L. B. Price, John Doe, Richard Roe and all others similarly situated, employees of the defendant, The E. C. Schroeder Company, Incorporated, a Corporation,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

This is a companion case to *Clifton* v. *Schroeder*, 10 Cir., 153 Fed. (2d) 385, *certiorari* denied 328 U. S. 858, petition for rehearing denied 70 L. ed. 1529. Respondents were co-workers with appellants in the *Clifton case*, on the

same job, for the same employer, doing the same kind of work, at the same times and in carrying out the same contracts.

Below, petitioner insisted upon incorporating in the stipulated facts some of the observations of Judge Phillips in his dissent in the *Clifton case*. It contended below and contends now that such "observations" are stipulated facts which did not appear in the record in the *Clifton case*. If this be true it is to say that Judge Phillips considered facts not shown by the record in his dissent. The trial court found (R. 22):

> "The plaintiffs herein were co-workers performing like duties of the plaintiffs in the case of *M. L. Clifton, etc.* v. *The E. C. Schroeder Co., Inc.*, No. 1282 in this court, 153 Fed. (2d) 385, *certiorari* denied 328 U. S. 858. The facts in this case are the same as those in the *Clifton case* and the issues here were among the issues decided in that suit. Defendant contends that certain admissions made by plaintiffs in the pre-trial stipulation in this case, which were not made in the *Clifton case*, are sufficient to support a result different from that reached by the majority of the Tenth Circuit Court of Appeals on the appeal thereof. Analysis of those 'admissions' referred to discloses that they are not points of material fact which were not before the court in the previous case, but are either inferences or conclusions capable of being drawn from the facts or are recitals of fact that appeared in the testimony and the court's findings of fact although not originally admitted by plaintiffs. The composite fact picture presented to the court now is identical with that before both this court and the appellate court in the *Clifton case*."

Because the issues and facts are the same the trial court concluded as a matter of law that the rule of *stare decisis*

or judicial precedent is the guiding one here, citing *Bigelow* v. *Old Dominion Copper Co.*, 225 U. S. 111, 30 Amer. Jur., Sec. 169, p. 913 (R. 23-24). The Circuit Court affirmed.

Since the decision in *Clifton* v. *Schroeder, supra,* a number of other cases bearing on the liability of the petitioner have been decided. Among these are:

Roland Electric Co. v. *Walling,* 326 U. S. 657, 90 L.ed. 383;
Martino v. *Michigan Window Cleaning Co.,* 327 U. S. 173, 90 L.ed. 603;
Rausch v. *Wolf,* 72 Fed. Supp. 658;
Meeker Cooperative Light & Power Assn. v. *Phillips,* 8th Cir., 158 Fed.(2d) 698;
Walling v. *McCrady Construction Co.,* 3rd Cir., 156 Fed.(2d) 932;
Ritch v. *Puget Sound Bridge & Dredging Co., Inc.,* 9th Cir., 156 Fed.(2d) 334.

After reciting the statute involved and emphasizing the provisions applicable, this Court in the *Roland Electric Company case* said (emphasis by the Court):

> "Every employer shall pay (not less than the required minimum wages) to each of his employees who is employed in any process or occupation necessary to the production, in any state, of any part or ingredient of any articles or subjects of trade, commerce or transportation, of any character, for trade, commerce or transportation among the several States. This *does* not require the employee to be directly 'engaged in commerce' among the several States. This does *not* require the employee to be employed even in the production of an article which itself becomes the subject of commerce or transportation among the several States. It is enough that the employees be employed,

for example, in an occupation which is necessary to the production of a part of any other 'Articles or subjects of commerce of any character' which are produced for trade, commerce or transportation among the several States. This does *not* require an employee to be employed exclusively in the specified occupation. This does *not* require that the occupation in which he is employed be *indispensable* to the production under consideration. It is enough that his occupation be *'necessary to the production.'* There may be alternative occupations that could be substituted for it but it is enough that the one at issue is needed in such production and would, if omitted, handicap the production."

In the *Martino case* this Court said:

"If the services rendered in this case had been rendered by employees of respondent's customers engaged in the production of goods for interstate commerce, those employees would have come under the Act. Respondent's employees are not to be excluded from such coverage merely because their employment to do the same work was under independent contracts. *A. B. Kirschbaum Co.* v. *Walling*, 316 U.S. 517, 524, 86 L.ed. 1638, 1648, 62 S. Ct. 116; *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U.S. 88, 90, 87 L.ed. 83, 84, 63 S. Ct. 125."

In *Armour & Company* v. *Wantock*, 323 U.S. 126, men who were employed as fire fighters and had nothing to do with the production of goods were held within the Act, the employer being engaged in the business of producing goods for commerce. There the Supreme Court said:

"* * * The occupation is not to be excluded from the Act merely because it contributes to the economy or to continuity of production. * * *"

We believe that by these cases this Court endeavored to set at rest all questions with respect to coverage under the Fair Labor Standards Act where the employee is engaged in the production of goods for commerce or in any occupation necessary thereto.

The application of the Act depends upon the character of the employees' activities and not the business of the employer.

Kirschbaum Company v. *Walling*,
86 L.ed. 1638;
Sykes v. *Lochmann*, 132 Pac.(2d) 620.

The fact that the prime contract was let by the Government does not exempt respondents from the coverage of the Act.

Clyde v. *Broderick*,
114 Fed.(2d) 348 (10 C.C.A.);
Bell v. *Porter*, 159 Fed.(2d) 117;
Alabama v. *King & Boozer*, 86 L.ed. 3.

If the oil companies producing in the Cumberland field had built the dyke, the respondents being their employees, and they being reimbursed by the Government for the money expended, could it be successfully contended such employees would not be entitled to the benefits of the Act because the Government paid the costs of the dyke?

One of the purposes of the statute is to remove burdens upon "the free flow of goods in commerce" and point is made in the *Roland Electric Co. case* that the services of the employees there were rendered during the "flow of

goods in commerce." Likewise here. Oil was being produced from the field for commerce at the time the dyke was constructed and the construction of the dyke was necessary in order that such production of oil for commerce continue. We are not here dealing with a situation where something in the way of a building or structure is being built with the possibility of future use in producing goods for commerce but rather where such work is necessary in order that the flow of goods in commerce, which is in progress, should continue unhampered and unlessened.

The dyke was constructed for a specific purpose. There was no other reason for it. There is no other use for it. Its use cannot be affected by economic factors. It cannot change hands. The goods used in its construction were used for one specific purpose—the continuation of the flow of oil in commerce. They were needed to continue that production of oil for commerce and if omitted would have handicapped that production.

The building of the dyke was in the nature of the maintenance of existing facilities presently used for the production of goods for commerce. Had the dyke not been built those facilities would have been hindered, hampered and probably destroyed. Respondents were engaged in maintaining facilities presently used for the production of goods for commerce.

It was stipulated and found by the trial court (R. 9):

> "In the absence of a dyke or some other suitable means to protect the oil field it would have been partially destroyed in the event the United States continued to go ahead with its plans to construct the Denison Dam and Reservoir. This would have *seriously* hampered the flow of oil from the field."

It is also stipulated that the oil produced from the oil field moved in interstate commerce.

The dam was completed and has been in use for a number of years now, and the dyke serves the purpose for which it was constructed, that is, the protection of the oil field from inundation.

It is therefore respectfully submitted that both upon the question of coverage under the Act and under the rule of *stare decisis* the judgment of the Circuit Court of Appeals is correct.

Respectfully submitted,

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JUNE, 1948.